Pravinchandra Doshi (t/a M/s P Doshi & Co) v Ismail bin Syed Mohamed & Anor

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22-529 OF 1982
JEFFREY TAN J
19 MARCH 1998

Bankruptcy *— Discharged bankrupt — Right to maintain action — Whether discharged bankrupt could maintain action without sanction of Official Assignee — Duty of discharged bankrupt to assist Official Assignee to realize assets to the latter — Bankruptcy Act 1967 ss 33(1) & 38(1)(a)*

The defendant applied to strike out the plaintiff's action on the ground that it was an abuse of the process of court. The defendant contended that the plaintiff was adjudged a bankrupt in March 1988 and that thereupon the cause of action rests with the Official Assignee. He further contended that the plaintiff applied for the sanction in May 1994 upon conditions and the plaintiff failed to meet those conditions. It was also argued that even though the plaintiff had been discharged, the plaintiff is yet beholden to the Official Assignee and under s 33 of the Bankruptcy Act 1967 ('the Act'), the plaintiff is duty bound to assist the Official Assignee to realize his assets to the Official Assignee. The plaintiff contended that the moment he was adjudged a bankrupt in 1988, he ceased all further prosecution of his action and applied for the required sanction under s 38(1)(a) of the Act. In December 1994, the plaintiff was granted an absolute order of discharge and the Official Assignee repaid the surplus funds to the plaintiff. Thus the Official Assignee has no further interest in the plaintiff and the plaintiff needs no further sanction to maintain this action. The senior assistant registrar dismissed the defendant's application. The defendant appealed.

Held, dismissing the appeal:

Undeniably, the plaintiff was incompetent whilst he was an undischarged bankrupt to maintain the action without the previous sanction of the Official Assignee. However, the plaintiff did not pursue his action during the entire period, ie between 1988 to 1994 that he was an undischarged bankrupt. It was only after he obtained an absolute discharge that he continued his action in January 1996. Since the sanction of the Official Assignee was not utilized and therefore the defendants or any other creditors could not have been prejudiced, the plaintiff's failure to comply with the conditions of the sanction, if at all there was such failure, was not relevant. Besides, it was not the right of the defendants to complain that the plaintiff had not complied with the conditions of the sanction. That right was with the Official Assignee.

When the plaintiff was granted an absolute discharge, he was entirely freed from the shackles of s 38(1)(a) of the Act. Admittedly, as provided under s 33(1) of the Act, the plaintiff shall,

notwithstanding his discharge, give such assistance as the Official Assignee required in the realization and distribution of such of his property as was vested in the Official Assignee. Nonetheless, it remained that the plaintiff was and is competent, until the court revoked his discharge, to maintain the action. As the plaintiff was given an absolute discharge and even given a refund of the surplus funds, the Official Assignee had no reason to hang on to the estate of the plaintiff or to continue to realize or distribute the property of the plaintiff. Therefore, the proposition that the plaintiff despite his absolute discharge had no capacity to maintain the action because of s 33(1) of the Act was totally unacceptable (see pp 41D–I and 42A–C).

The defendants did not at any time put the alleged incapacity of the plaintiff to maintain the action in issue until the action was called up for full trial. Rather, the defendants even agreed to start the case. The defendants were estopped by their conduct from making this application. Further, the defendants admitted that the plaintiff supplied goods to the defendants to the value of the balance sum of RM321,938.74 and the plaintiff averred that the sum had not been paid. Prima facie, with that admission, the plaintiff had more than a reasonable cause of action. It could hardly be said that the plaintiff's action was an abuse of the process of court (see pp 42I and 43A–B, E–F).

[Bahasa Malaysia summary

Defendan telah memohon untuk membatalkan tindakan plaintif atas alasan bahawa ia merupakan satu penyalahgunaan proses mahkamah. Defendan menegaskan bahawa plaintif telah dihukum sebagai seorang bankrap dalam bulan Mac 1988 dan bahawa oleh itu kausa tindakan terletak pada Pegawai Pemegang Harta. Beliau selanjutnya menegaskan bahawa plaintif telah memohon untuk kebenaran atau saksi dalam bulan Mei 1994 atas syarat-syarat dan plaintif telah gagal memenuhi syarat-syarat tersebut. Adalah juga dihujahkan bahawa walaupun plaintif telah dilepaskan, plaintif masih lagi terhutang kepada Pegawai Pemegang Harta dan di bawah s 33 Akta Kebankrapan 1967 ('Akta tersebut'), plaintif adalah terikat kepada kewajipan untuk membantu Pegawai Pemegang Harta untuk melangsaikan aset-asetnya kepada Pegawai Pemegang Harta. Plaintif menegaskan bahawa sebaik sahaja beliau dihukum sebagai seorang bankrap dalam tahun 1988, beliau telah menghentikan kesemua pendakwaan selanjutnya akan tindakan beliau dan telah memohon untuk mendapatkan sanksi yang diperlukan di bawah s 38(1) (a) Akta tersebut. Dalam bulan Disember 1994, plaintif telah dberikan perintah pelepasan mutlak dan Pegawai Pemegang Harta telah membayar balik wang yang berlebihan kepada plaintif. Dengan itu Pegawai Pemegang Harta tidak lagi mempunyai kepentingan yang selanjutnya terhadap plaintif dan plaintif tidak memerlukan sanksi yang selanjutnya untuk mengekalkan tindakan ini. Penolong kanan pendaftar telah menolak permohonan defendan. Defendan telah merayu.

Diputuskan, menolak rayuan:
Dengan tidak dapat dinafikan, plaintif tidak kompeten ketika beliau merupakan bankrap yang belum dilepaskan untuk mengekalkan tindakan tersebut tanpa sanksi lebih awal Pegawai Pemegang Harta tersebut. Walau bagaimanapun, plaintif telah tidak meneruskan tindakannya ketika keseluruhan tempoh tersebut, iaitu antara 1988 hingga 1994 bahawa beliau merupakan si bankrap yang belum dilepaskan. Adalah hanya selepas beliau memperolehi pelepasan mutlak, beliau telah meneruskan tindakannya dalam bulan Januari 1996. Oleh kerana sanksi Pegawai Pemegang Harta telah tidak digunakan dan dengan itu defendan-defendan atau mana-mana pemiutang yang lain tidak mungkin telah dimudaratkan, kegagalan plaintif untuk mematuhi syarat-syarat sanksi tersebut, jika sesungguhnya terdapat kegagalan yang sedemikian, adalah tidak relevan. Lagipun, ianya bukan hak defendan-defendan untuk mengadu bahawa plaintif telah tidak mematuhi syarat-syarat sanksi tersebut. Hak itu adalah pada Pegawai Pemegang Harta.

Ketika plaintif diberikan pelepasan mutlak, beliau adalah bebas secara keseluruhannya daripada belenggu s 38(1)(a) Akta tersebut. Adalah diakui sepertimana yang diperuntukkan di bawah s 33(1) Akta tersebut, plaintif akan, meskipun pelepasannya, memberikan bantuan yang sedemikian sepertimana yang diperlukan oleh Pegawai Pemegang Harta dalam pelangsaian dan pengagihan yang sedemikian dari harta beliau sepertimana yang diletakhak pada Pegawai Pemegang Harta tersebut. Namun begitu, ianya kekal bahawa plaintif telah dan adalah tidak kompeten sehingga mahkamah membatalkan pelepasannya, untuk mengekalkan tindakan tersebut. Oleh kerana plaintif diberikan pelepasan mutlak dan juga diberikan pembayaran balik akan wang yang berlebihan, Pegawai Pemegang Harta tidak mempunyai alasan untuk terus memegang hartanah plaintif tersebut atau terus melangsaikan atau mengagihkan hartanah plaintif. Dengan itu, proposisi bahawa plaintif sungguhpun telah diberi pelepasan mutlak tidak mempunyai keupayaan untuk mengekalkan tidakan tersebut disebabkan oleh s 33 (1) Akta tersebut adalah sesungguhnya tidak boleh diterima (lihat ms 41D–I dan 42A–C).

Defendan-defendan tidak pada bila-bila masa pun mengemukakan ketidak-upayaan yang didakwa plaintif yang didakwa itu untuk mengekalkan tindakan yang menjadi itu tersebut sehingga tindakan itu dipanggil untuk perbicaraan penuh. Sebaliknya, defendan-defendan sesungguhnya bersetuju untuk memulakan kes tersebut. Defendan-defendan telah diestop oleh perlakuan mereka daripada membuat permohonan ini. Selanjutnya, defendan-defendan mengakui bahawa plaintif telah membekalkan barangan kepada defendan-defendan bernilai jumlah baki sebanyak RM321,938.74 dan plaintif menegaskan bahawa jumlah tersebut masih belum dibayar. Prima facie, dengan pengakuan-pengakuan itu, plaintif mempunyai lebih daripada kausa tindakan yang munasabah. Ia berkemungkinan tidak boleh diperkatakan bahawa tindakan plaintif adalah suatu penyalahgunaan proses mahkamah (lihat ms 42I dan 43A–B, E–F).]

Notes

For cases on bankruptcy generally, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1242–1652.

Cases referred to

Chin Kon Nam v Chai Yun Phin Development Sdn Bhd [1996] 4 MLJ 271 (refd)

Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor [1993] 1 AMR 368 (refd)

Khoo Kim Hock, Re [1974] 2 MLJ 29 (refd)

Low Kok Tuan Ex p Arab-Malaysia Merchant Bank Bhd, Re [1997] 4 CLJ 185 (refd)

Richland Trade & Development Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1996] 4 MLJ 233 (refd)

Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd & Ors [1992] 2 MLJ 588 (refd)

Syarifah Aini bte Syed Jaafar v Karangkraf Sdn Bhd [1989] 2 CLJ 1269 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 2, 24, 33(11), 35, 38(1)(a), 92(1), 105

Rules of the High Court 1980 O 18 r 19(1)(a), (d)

Joginder Singh (*Kassim Tadin, Wai & Co*) for the plaintiff.

Teja Singh (*Teja Singh Penesar & Co*) for the defendants.

Cur Adv Vult

Jeffrey Tan J: This is the defendants' appeal (encl 100) to judge-in-chambers against the order of the learned senior assistant registrar dismissing with costs their application (encl 99) to strike out the plaintiff's action under O 18 r 19(1)(d) of the Rules of the High Court 1980 that reads:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
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> ...
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> (d) it is otherwise an abuse of the process of the Court,
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> and may order the action to be stayed or dismissed, or judgment to be entered accordingly, as the case may be.

It is also convenient, at this juncture, before moving to the issues raised in this appeal, to refer to a further statutory provision, that is, s 38(1)(a) of the Bankruptcy Act 1967 ('the Act'), that reads:

> Where a bankrupt has not obtained his discharge —

A (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee; ... .

Mr Teja Singh contended on behalf of the defendant that the plaintiff was adjudged a bankrupt on 14 March 1988 and that thereupon the cause of B action rests with the Official Assignee ('the OA'). He further contended that the plaintiff applied for the said sanction on 18 May 1994; the OA granted the sanction upon conditions and the plaintiff failed to meet those conditions. 'When the plaintiff was made a bankrupt', he said, 'his entire estate passed to the OA'. 'When he was discharged, his estate did not revert to him.' The plaintiff has no right to maintain this action, he asserted. As an C analogy, he said, Mr Teja referred to s 33(11) of the Act, that reads:

> A discharged bankrupt shall, notwithstanding his discharge, give such assistance as the Official Assignee requires in the realization and distribution of such of his property as is vested in the Official Assignee, and if he fails to do so he shall be guilty of a contempt of court; and the court may also, if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, D disposition or payment duly made, or thing duly done subsequent to the discharge, but before its revocation.

Mr Teja continued his revelation of the law, as follows. Despite his discharge, the plaintiff is yet beholden to the OA and to the Act. Under s 35 of the Act, only disclosed debts are released. The plaintiff is yet duty bound E to assist the OA to realize his assets to the OA. Where a receiving order and adjudication order has been annulled, all property reverts to the discharged bankrupt. However, where a receiving order has been discharged, the bankrupt's estate would not revert to the discharged bankrupt but would remain with the OA. Discharge would not relieve a discharged bankrupt of his duty under s 33(11) of the Act. Under s 24 of the Act, when the plaintiff F was adjudged a bankrupt, his property became divisible among his creditors and vested with the OA. The discharge did not affect that position as the plaintiff is still under a continuing duty to assist the OA in the realization of his assets. This action is a 'thing in action' and therefore property within the meaning of s 2 of the Act. The cause of action vests with the OA and the G plaintiff is not competent to maintain this action.

Mr Joginder Singh for the plaintiff responded as follows. The plaintiff had capacity, in 1982, to file this action. However, the moment he was adjudged a bankrupt, in 1988, he ceased all further prosecution of his action and applied for the required sanction under s 38(1)(a) of the Act. On 18 May 1994, the plaintiff obtained that sanction. Five months later, the H plaintiff applied to court for an order of discharge. On 15 December 1994, the plaintiff was granted an absolute order of discharge. Six months later, the OA repaid the surplus funds to the plaintiff. The OA has no further interest in the plaintiff. The plaintiff needs no further sanction to maintain this action. In *Richland Trade & Development Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1996] 4 MLJ 233, where the plaintiff became I a bankrupt and it was contended that the action must be withdrawn, the court held that the plaintiff could maintain his action as it was instituted

before the receiving order and adjudication order. In the instant case, the capacity of the plaintiff to maintain the action, because he has been discharged, is even stronger. Gross delay alone is sufficient to dismiss this application. The defendants are estopped by their conduct — on 4 November 1997, when this case was called for full trial, the defendants contended that the balance sum of RM321,938.74 due on the supply of goods by the plaintiff to the defendants had been paid and the defendants agreed to start the case — from making this application.

Mr Teja merely replied that delay is not relevant as the plaintiff had and has no capacity to maintain the action. In that connection, he referred to *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor* [1993] 1 AMR 368 at p 370, an appeal to judge-in-chambers against the order of the learned SAR setting aside a defective judgment, where it was held, by Siti Norma Yaakob J (as she then was), that 'delay can never act against the party applying to have such defective judgment set aside'.

It should be helpful, in connection with the implication and effect of s 38(1)(a) of the Act, to recall the enunciation in some of the authorities.

'It is trite law that upon a person being adjudged a bankrupt, all his affairs become vested in the Official Assignee': *Re Low Kok Tuan, ex p Arab-Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185, per Low Hop Bing J. 'On the making of the receiving order, the bankrupt's property, land and interest in land vest in the Official Assignee as trustee': *National Land Code* by Judith Sihombing at pp 326–327. Without prior sanction, a bankrupt has no capacity to institute an action: *Chin Kon Nam v Chai Yun Phin Development Sdn Bhd* [1996] 4 MLJ 271 at p 278, per Abdul Kadir Sulaiman J. 'A right of action relating to property is to be conducted through the Official Assignee but any right of action arising from injury to a bankrupt's person does not pass to the Official Assignee but remains with the bankrupt': *Sharifah Aini bte Syed Jaafar v Karangkraf Sdn Bhd* [1989] 2 CLJ 1269, per Ajaib Singh J (as he then was). However, 'the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The exception contained within brackets in s 38(1) clearly indicates that the section is intended to apply only to actions for recovery of something — either real or personal — which can be turned into assets, such as a claim for recovery of property or money due': *Re Khoo Kim Hock* [1974] 2 MLJ 29, per Mohamed Azmi J (as he then was). (By way of contrast, see *Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd & Ors* [1992] 2 MLJ 588, where it was held, by Siti Norma Yaakob J (as she then was), that the only exception is when the bankrupt files an action for damages for injury to his person or when he questions his status by filing an application under s 92(1) or s 105 of the Act).

Two of the aforesaid authorities in particular dealt with striking out applications, the same circumstance as the instant case.

In *Chin Kon Nam v Chai Yun Phin Development Sdn Bhd*, an appeal by the first plaintiff to judge-in-chambers against the order of the learned SAR

striking out his writ of summons on the ground that the first plaintiff being an undischarged bankrupt had no locus standi to commence and/or maintain an action for breach of contract, Abdul Kadir Sulaiman J held that the first plaintiff without the prior sanction of the Official Assignee was not competent to engage an advocate and solicitor to represent him.

In *Richland Trade & Development Sdn Bhd Ors v United Malayan Banking Corp Bhd*, an application by the defendant: (i) to strike out the second plaintiff on the ground that the second plaintiff had been declared a bankrupt; and (ii) to strike out the writ of summons under O 18 r 19 and on the grounds of estoppel and res judicata, Vincent Ng J held, that: 'in view of the fact that the second plaintiff was made bankrupt only after the service of the summons on the defendant, there was no necessity for her to withdraw her action but only to obtain the sanction of the Official Assignee'. Vincent Ng J as well enunciated that the word 'maintain' in s 38(1) of the Act should not be read to mean 'that a bankrupt cannot keep alive any action without the previous sanction of the Official Assignee' as that 'would not make sense as it would work injustice on the bankrupt to require him or her to withdraw same and file afresh upon obtaining sanction'.

Undeniably, in the instant case, the plaintiff was incompetent, whilst he was an undischarged bankrupt, to maintain the action without the previous sanction of the OA. However, the plaintiff did not pursue his action, so the court file bears witness, during the entire period, ie between 1988 to 1994 that he was an undischarged bankrupt. In fact, the plaintiff took no steps, even after he obtained the sanction of the OA, to do so. It was only after, well after he obtained an absolute discharge that the plaintiff continued his action, by filing a summons-for-directions (encl 59) on 24 January 1996. Surely, there was all compliance with s 38(1)(a) of the Act.

Mr Teja complained that the plaintiff had not complied with the conditions of the sanction. But sadly, with respect, it was not at all appreciated that the plaintiff had more than complied with s 38(1)(a) of the Act, for he took no steps to pursue his action, despite the sanction of the OA, throughout the entire duration that he was an undischarged bankrupt. In the event, the sanction of the OA and the alleged non-compliance of the conditions of the sanction, since the sanction of the OA was not utilized and therefore the defendants or other creditors could not have been prejudiced in any way by the plaintiff's failure to comply with the conditions of the sanction, if at all there was such failure, are not relevant. Besides, it is not the right of the defendants to complain that the plaintiff had not complied with the conditions of the sanction. That right is with the OA who has no complaints whatsoever. Anyway, as said, the issue is academic.

It was also not at all appreciated that the plaintiff was incompetent to maintain the action without the previous sanction of the OA only because he was an undischarged bankrupt. But when he was granted an absolute discharge, he was entirely freed from the shackles of s 38(1)(a) of the Act. Really, it is so elementary and equally so obvious that it could not be argue otherwise. Admittedly, as provided by s 33(1) of the Act, the plaintiff shall, notwithstanding his discharge, give such assistance as the OA requires in the

realization and distribution of his property as is vested in the OA, and if he fails to do so he shall be guilty of a contempt of court; and the court may also, if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, disposition or payment duly made, or thing duly done subsequent to the discharge, but before its revocation. Nonetheless, it remains, that the plaintiff was and is competent, until the court revokes his discharge, to maintain the action. What more, most pertinently, as the plaintiff was granted an absolute discharge and even given a refund of the surplus funds, which could only have been if the OA had satisfied the claims of the plaintiff's creditors, whereupon, the OA had no reason to hang on to the estate of the plaintiff or to continue to realize or distribute the property of the plaintiff. It could only be said, with respect, that Mr Teja's proposition that the plaintiff despite his absolute discharge has no capacity to maintain the action, because of s 33(1) of the Act, is totally unacceptable. The proposition is as absurd as it is farcical as to suggest that a man who has served his sentence must yet observe the prison rules.

Mr Joginder complained that the defendants are estopped by their conduct from making the striking out application. Indeed, the conduct of the defendant as well as the bona fides of the striking out application are highly questionable.

The plaintiff took out, after he was granted an absolute discharge, a summons-for-directions (encl 59) that the learned SAR settled on 17 July 1996 in the presence of Mr Teja and Mr Govindarajoo on behalf of Mr Joginder. Further to the disposal of encl 59, the plaintiff applied (encl 68) for the early trial of his action. On 13 January 1997, the court set down the action for trial. On 4 November 1997, when this action was called up for full trial, Mr Teja conceded that the plaintiff supplied goods to the defendants to the balance sum of RM321,938.74 and that the plaintiff would not be required to prove the balance sum of RM321,938.74. But he also contended that the defendants had paid the balance sum. He agreed that the defendants would start the case. Mr Teja then applied for a short adjournment to enable him to obtain the proof that the sum of RM321,938.74 had been settled. On 2 February 1998, the defendants filed an application (encl 88) to strike out the action under O 18 r 9(1)(a). On 20 February 1998, when the action was called up for full trial, Mr Teja informed the court that the defendants had filed an application (encl 88) to strike out the action. Mr Teja then applied for the full trial to be adjourned pending the disposal of the striking out application (encl 88). Reluctantly, the court granted the adjournment, reluctantly, because a striking out application under O 18 r 19 is irreconcilable with the defendants' admission that the plaintiff supplied goods to the value of the sum claimed but yet that application ought not be heard. On 2 March 1998, the defendants filed a second application (encl 99 — the subject of this appeal) to strike out the plaintiff's action under O 18 r 19(1)(d). On 12 March 1998, the defendants withdrew encl 88 but proceeded with encl 99 that the learned SAR dismissed with costs after hearing arguments.

From that scrutiny of the proceedings, it is apparent that the defendants did not at any time put the alleged incapacity of the plaintiff to maintain the

action in issue until the action was called up for full trial. Rather, the defendants even agreed to start the case, with proof of the payments he would be obtaining, on the adjourned date. But on the adjourned day, when the defendants were to start the case with proof of the payments, they announced through Mr Teja that they had an application to set aside the action, thereby pre-empting the proceedings they agreed to start and also constraining the court to grant a further adjournment. And so, from a position whence they were to start the case with proof of the payment of the sum claimed, the defendants dislocated to a position whence they had excuse not to start the case nor adduce proof that the claim had been settled. However, the defendants left a trail of strong suspicion that the striking out application was solely put in to avoid, or to frustrate some would say, the full hearing. And that suspicion was not removed by the grounds of the striking out application. For Mr Teja, who also happened to be counsel for the second plaintiff in *Richland* and would have opposed the alleged incapacity of that second plaintiff, would have known, since *Richland* was decided in his favour, of the frivolity of the instant striking out application and that the plaintiff was competent to maintain the action. Yet Mr Teja would argue before this court, a case of doing unto others, that the plaintiff was and is incompetent to maintain this action despite his absolute discharge.

The defendants admitted before the court that the plaintiff supplied goods to the defendant to the value of the balance sum of RM321,938.74. The plaintiff avers that the sum of RM321,938.74 has not been paid. Prima facie, with that admission, the plaintiff has more than a reasonable cause of action. Hardly could it be said, indeed totally unarguable, that the plaintiff's action is an abuse of the process of court. Plainly and obviously, this is not a spurious action nor a case for striking out under ground (d) or under the inherent jurisdiction of the court. This is a case awaiting the defendants' proof that the sum claimed had been paid.

In the premises of the aforesaid, this appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Jafisah Jaafar